181 FERC ¶ 61,206
DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. PL23-1-000]

Oil Pipeline Affiliate Committed Service

(Issued December 16, 2022)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Proposed policy statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to revise its policy for evaluating whether contractual committed transportation service complies with the Interstate Commerce Act where the only shipper to obtain the contractual committed service is the pipeline's affiliate. Specifically, in addition to those factors the Commission has considered in the past, the Commission proposes to evaluate the rate and non-rate terms offered in the open season to ensure they were not structured to favor the pipeline's affiliate and to exclude nonaffiliates.

DATES: Initial Comments are due on or before February 13, 2023, and Reply Comments are due on or before March 30, 2023.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through http://www.ferc.gov, is preferred.

- Electronic Filing: Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

- Mail via U.S. Postal Service Only: Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.
- Hand (including courier) delivery: Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

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SUPPLEMENTARY INFORMATION:

181 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Oil Pipeline Affiliate Committed Service Docket No. PL23-1-000

PROPOSED POLICY STATEMENT

(Issued December 16, 2022)

1. In this Proposed Policy Statement, we propose to revise our policy for evaluating whether contractual committed transportation service between oil pipelines and their affiliates complies with the Interstate Commerce Act (ICA).[1] As discussed below, the Commission relies upon the pipeline's holding of a public open season followed by an arm's-length transaction to conclude that the resulting contractual committed service is just and reasonable and not unduly discriminatory. However, when the only shipper to agree to a committed transportation service is the pipeline's affiliate (Affiliate-Only Committed Service), there is no arm's-length transaction to support a presumption of reasonableness and nondiscrimination. Instead, the contractual service offered in the open season may have been structured to unduly discriminate against nonaffiliates. We are concerned that our present policies are not sufficient to address these issues and ensure that Affiliate-Only Committed Service complies with the ICA.

[1] 49 U.S.C. app. 1 *et seq.*

2. Accordingly, we propose to change our policy for determining whether an Affiliate-Only Committed Service is just, reasonable, and not unduly discriminatory. In addition to those factors the Commission has considered in the past, we propose to evaluate the rate and non-rate terms offered in the open season to ensure they were not structured to favor the pipeline's affiliate and to exclude nonaffiliates. We believe that this proposal will provide guidance to industry participants that will aid in the efficient deployment of capital and the monitoring of transportation service provided under long-term contracts. We seek comment on our proposal.

I. Background on Oil Pipeline Contracting Arrangements

3. Under the ICA, an oil pipeline is a common carrier that must provide transportation to shippers upon reasonable request.[2] A pipeline has the burden to demonstrate that its proposed rates and services are just, reasonable, and not unduly discriminatory or preferential.[3] Historically, pipelines have offered transportation service

[2] *Id.* at 1(4) ("It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor."); *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219, at P 12 (2017) (*Magellan*) ("By definition, a pipeline is a common carrier, and is bound by the ICA to ship product as long as a reasonable request for service is made by a shipper…."), *order on reh'g and clarification*, 181 FERC ¶ 61,207 (2022) (*Magellan* Rehearing Order).

[3] *See*, e.g., *Laurel Pipe Line Co.*, 167 FERC ¶ 61,210, at P 24 n.37 (2019) (oil pipelines have the burden to demonstrate that proposed rates are just and reasonable); *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277, at P 4 (2019) ("An oil pipeline bears the burden of demonstrating that proposed rates and changes to its tariff are just and reasonable."); *see also* 49 USC app. 1, 2, 3(1), 5, 7, 15(1).

on a walk-up basis without having contracts with shippers. Since the mid-1990s,[4] however, the Commission has also approved oil pipeline transportation rates and terms of service pursuant to long-term contracts with ship-or-pay obligations.[5] Because committed contract shippers are not similarly situated to uncommitted shippers,[6] they may receive service as defined by the contract (contractual committed service)[7] that differs from uncommitted service.

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[4] *See Express Pipeline P'ship*, 76 FERC ¶ 61,245 (1996) (*Express*).

[5] "Contract" as used in this Proposed Policy Statement includes transportation service agreements (TSA) and any similar contract offered by a pipeline under which an entity must make a term commitment associated with interstate oil pipeline transportation service subject to the Commission's jurisdiction under the ICA. *See*, e.g., *Saddlehorn Pipeline Co.*, 169 FERC ¶ 61,118 (2019); *EnLink Del. Crude Pipeline, LLC*, 166 FERC ¶ 61,226 (2019); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180 (2012).

[6] *See Express*, 76 FERC at 62,254 ("[Committed] shippers are not similarly situated with uncommitted shippers because in any given month, uncommitted shippers may choose to ship on [the pipeline] or not. Uncommitted shippers have the maximum flexibility to react to changes in their own circumstances or in market conditions. Uncommitted shippers do not provide the revenue assurances, planning assurances, and a basis for constructing the pipeline that [committed] shippers provide.").

[7] The contractual committed service is defined by the rates and terms the shipper agreed to in the contract. The Commission has explained that different contractual terms of service (such as tiered rates associated with different volume or term-length commitments or different prorationing benefits) are distinct committed services. *See Seahawk Pipeline, LLC*, 175 FERC ¶ 61,186, at PP 12-14 (2021) ("differing terms and conditions of service . . . creates distinct services and classes of shippers"); *Medallion Del. Express, LLC*, 170 FERC ¶ 61,047, at P 27 (2020) (finding two distinct services where one class of shippers made term and volume commitments that were not required of the other class of shippers); *Medallion Midland Gathering, LLC*, 170 FERC ¶ 61,048, at P 30 (2020) (*Medallion Midland*) (same); *EnLink NGL Pipeline, LP*, 167 FERC ¶ 61,024, at P 18 n.22 (2019) (finding a distinct committed service for expansion capacity

4. Contractual committed service complies with the ICA's common-carriage and nondiscrimination requirements when the same rates and terms are offered in a public open season where all interested shippers have an equal opportunity to obtain the committed service.[8] When the open season results in an arm's-length agreement, the Commission presumes the contractual committed service is just and reasonable and

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even though the pipeline offered the same committed rate as already in effect for its base capacity committed service).

[8] *Sea-Land Serv., Inc v. ICC,* 738 F.2d 1311, 1317 (D.C. Cir. 1984) ("[C]ontract rates can . . . be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms."); *Express Pipeline P'ship*, 77 FERC ¶ 61,188, at 61,756 (1996) ("The proposed term rate structure of Express does not violate the antidiscrimination or undue preference provisions of the [ICA] because such term rates were made available to all interested shippers."); *Enter. Crude Pipeline LLC*, 166 FERC ¶ 61,224, at P 11 (2019) (*Enterprise Crude*) ("The vital element of the contracting arrangements . . . has been an open season that provided all shippers equal opportunity to avail themselves of the offered capacity"); *Enter. TE Prods. Pipeline Co.*, 144 FERC ¶ 61,092, at P 22 (2013) ("The availability of discount rates to *all* interested shippers is the fundamental requirement upon which rulings approving such rate structures have been based. Contract rates can only satisfy the principle of nondiscrimination when the carrier offering such rates is required to make them available to 'any shipper willing and able to meet the contract's terms.' All prospective shippers must have an equal, non-discriminatory opportunity to review and enter into contracts for committed service.") (quoting *Sea-Land*, 738 F.2d at 1317) (emphasis in original)); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151, at P 37 (2014) (open season process must be "open, transparent, and free of the traditional contract nullifiers such as fraud"); *see also Nexen Mktg. U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at PP 1, 46-49 (2007) (*Nexen*) ("The allocation of expansion capacity during the open season was inconsistent with the principles of common carriage because all shippers were not given an equal opportunity to obtain the expansion capacity."); *White Cliffs Pipeline, L.L.C.*, 148 FERC ¶ 61,037, at PP 47-51 (2014) (explaining an open season must "afford *all* potentially interested shippers . . . a fair and equal opportunity to acquire the . . . capacity" and finding the pipeline failed to meet "basic common carrier and anti-discrimination obligations" when it "afforded an undue preference to the shippers that contracted for [] capacity outside of a valid open season process") (emphasis in original).

non-discriminatory.[9] In such cases, the presence of one or more nonaffiliated contracting shippers supports a presumption of reasonableness and nondiscrimination because the Commission assumes that nonaffiliated shippers are sophisticated parties that can be relied upon to protect their own interests from those of the pipeline, ensuring the agreement responds to competitive conditions.[10]

II. Concerns Regarding Affiliate-Only Committed Service

5. We are concerned regarding the adequacy of our present policies for addressing situations where, following an open season, only the pipeline's affiliated[11] shipper agrees

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[9] E.g., *Tesoro High Plains Pipeline Co.*, 148 FERC ¶ 61,129, at P 23 (2014) ("The Commission honors the contract terms entered into by sophisticated parties that engage in an arms-length negotiation."); *Seaway Crude Pipeline Co.*, Opinion No. 546, 154 FERC ¶ 61,070, at PP 40-42 (2016) (holding that a proper review of a pipeline's contractual committed rates includes investigating whether the open season involved arm's-length negotiations); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151 at P 25 ("Absent a compelling reason, it would be improper to second guess the business and economic decisions made between sophisticated businesses when entering negotiated rate contracts.").

[10] *Express*, 76 FERC at 62,254 ("If [contract] terms result in lower costs or respond to unique competitive conditions, then shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling or unable to do so.") (quoting *Sea-Land*, 738 F.2d at 1316); *see also Sea-Land*, 738 F.2d at 1316 ("The core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist."); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151 at P 28 ("When reviewing the justness and reasonableness of a contract rate, it is not primarily to relieve one party or another of what they deem an improvident bargain, especially in negotiations involving sophisticated business entities. However, contract negotiations must be held in good faith and not involve fraud or improper conduct.").

[11] "Affiliate" or "affiliated" as used in this Proposed Policy Statement means an entity that, directly or indirectly, controls, is controlled by, or is under common control with, the oil pipeline carrier. This definition is based upon the Commission's Standards

to a contractual committed service (Affiliate-Only Committed Service).[12] This has arisen in several recent filings with the Commission.[13] As discussed below, when an open season results in an Affiliate-Only Committed Service: (1) there may be concerns about the fairness of the open season; (2) there is no arm's-length transaction supporting a presumption of reasonableness; and (3) there is an inherent incentive for the pipeline to unduly discriminate in favor of its affiliate. We are concerned that our present policies

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of Conduct regulations for electric utilities and natural gas pipelines. *See* 18 CFR 358.3(a); *see also id.* pt. 352 (defining "affiliated companies" in a similar manner for accounting purposes). The Commission's Standards of Conduct regulations define "control" as "the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity" and specify that "[a] voting interest of 10% or more creates a rebuttable presumption of control." *Id.* 358.3(a)(3).

[12] As used in this Proposed Policy Statement, "Affiliate-Only Committed Service" refers to a contractual committed service that is agreed to by only the pipeline's affiliate(s) and not any nonaffiliated entity. As explained above, different contractual terms of service (such as tiered rates associated with different volume or term-length commitments, or different prorationing benefits) are distinct committed services. *See supra* n.7. For example, when a pipeline offers a contract that includes various rate, term, and volume-commitment tiers, an Affiliate-Only Committed Service occurs if only the pipeline's affiliate agrees to a certain tier, notwithstanding the fact that nonaffiliated shippers may have agreed to other tiers offered in the contract. In this example, the Affiliate-Only Committed Service is defined by the specific rate, volume, and term-length tier agreed to by the affiliated shipper but no nonaffiliated shippers. In contrast, any specific tier agreed to by an affiliate and one or more nonaffiliated shippers is not an Affiliate-Only Committed Service.

[13] *See, e.g.*, *Seahawk*, 175 FERC ¶ 61,186; *Medallion Pipeline Co.*, 170 FERC ¶ 61,192, at P 7 (2020) (*Medallion*); *Medallion Del. Express, LLC*, 163 FERC ¶ 61,170, at P 8 (2018); *Medallion Midland*, 170 FERC ¶ 61,048; *ONEOK Elk Creek*, 167 FERC ¶ 61,277; *Blue Racer NGL Pipelines, LLC*, 162 FERC ¶ 61,220, at P 6 (2018) (*Blue Racer*); *Midstream Crude Oil Pipeline, LLC*, 160 FERC ¶ 61,010, at P 4 (2017) (*Stakeholder*); *Medallion Pipeline Co.*, 157 FERC ¶ 61,075, at P 11 (2016); *EnLink Crude Pipeline*, 157 FERC ¶ 61,120, at P 4 (2016) (*EnLink Crude*).

do not adequately address these issues to ensure fairness to nonaffiliated shippers participating in oil pipeline open seasons.[14]

6. First, parties have raised concerns in various proceedings that pipelines may be affording an undue preference to their affiliates during the open season process for committed capacity.[15] While commercial circumstances may cause an affiliate to be the

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[14] *New York v. United States*, 331 U.S. 284, 296 (1947) ("The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations."). We recognize that the Commission issued a proposed policy statement in Docket No. PL21-1-000 proposing guidance for oil pipelines to demonstrate that proposed rates and terms pursuant to affiliate-only contracts comply with the ICA. *Oil Pipeline Affiliate Contracts*, 173 FERC ¶ 61,063 (2020). The Commission withdrew that proposed policy statement shortly after initial comments were filed. *Oil Pipeline Affiliate Contracts*, 173 FERC ¶ 61,250 (2020). Since that time, we have continued to consider our policies for evaluating Affiliate-Only Committed Service. Although we recognize that the Commission received initial comments in Docket No. PL21-1, we observe that the proposed policy changes discussed herein differ from the proposal in Docket No. PL21-1 in multiple respects, including modifications to: (1) the proposed cost-of-service safe-harbor; and (2) standards for evaluating non-rate terms. Moreover, because the Commission withdrew the proposal in Docket No. PL21-1 before reply comments were filed, the record in that proceeding does not include responses to arguments raised in the initial comments.

[15] *See, e.g., Blue Racer*, 162 FERC ¶ 61,220 at P 16 (protester alleged that "the open season and required shipper commitments serve only to benefit [the pipeline's] affiliate"); *N.D. Pipeline Co.*, 147 FERC ¶ 61,121, at P 20 (2014) (protester alleged that pipeline's proposed rate structure "appears designed to confer economic benefits on an affiliated shipper"); Shell Trading (US) Co., Comments, Docket No. OR17-2-001, at 7 (filed Mar. 14, 2018) (Shell Comments) (expressing concerns that "new capacity can be priced in a way that is uneconomical for an independently functioning shipper but could be economical for an affiliated marketer through direct sales of capacity at customized rates, or through commodity transactions which have the same economic impact as such direct sales, taking advantage of its integrated company finances"); Magellan Midstream Partners, L.P., Request for Rehearing, Docket No. OR17-2-001, at 5 (filed Dec. 22, 2017) (requesting clarification regarding whether a pipeline can structure the terms and conditions of an open season such that, due to integrated-company economics, its marketing affiliate is the only shipper that can enter a contract for capacity); Liquids Shippers Grp., Comments, Docket No. OR17-2-000, at 4 (filed Dec. 14, 2016)

only shipper to agree to a committed service, the Commission must ensure that Affiliate-Only Committed Service is just and reasonable and does not result from an open season that discriminates against nonaffiliates.

7. Second, unlike agreements with nonaffiliates, Affiliate-Only Committed Service does not result from arm's-length transactions.[16] In the absence of an arm's-length transaction, the Commission lacks the same assurance that the Affiliate-Only Committed Service reflects just and reasonable and nondiscriminatory terms. Rather, an affiliated shipper may be indifferent to any rate paid to its affiliated pipeline because the expenditures and earnings of the affiliates are combined at the parent-company level under integrated-company economics.[17] Thus, one way for a pipeline to provide its

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(expressing "concerns regarding the potential for undue discrimination or preference by a common carrier in favor of a marketing affiliate"); Airlines for America and Nat'l Propane Gas Ass'n, Petition for Rulemaking, Docket No. RM18-10-000, at 24 (filed Feb. 1, 2018) (asserting that "pipelines are coordinating with their marketing affiliates to offer preferential rates and terms of service").

[16] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) ("A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."); *Tapstone Midstream, LLC*, 150 FERC ¶ 61,016, at P 15 (2015) ("Because the shipper is an affiliate, there is no assurance that there was an arms-length negotiation between the entities agreeing to the rate."); Opinion No. 546, 154 FERC ¶ 61,070 at PP 92-96 (sales between affiliates are not arm's-length because "arm's length negotiations or transactions are characterized as adversarial negotiations between parties that are each pursuing independent interests"); Black's Law Dictionary (11th ed. 2019) (defining "arm's-length" as "involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power").

[17] *See Magellan*, 161 FERC ¶ 61,219 at P 14 (while the marketing affiliate "would facially pay its pipeline's filed tariff rate, and the [m]arketing [a]ffiliate would sell that capacity for less than that rate, the entire transaction could nevertheless yield a net profit

affiliate unduly preferential access to capacity is to offer a contract rate in the open season that is onerous or uneconomic for any nonaffiliated market participant. Similarly, an affiliate may not be meaningfully bound to any onerous terms in the contract such as deficiency or shortfall penalties because deficiency payments and penalties may be transfer payments within an integrated economic entity. Therefore, the potential exists for a pipeline to unduly discriminate in favor of its affiliate by offering onerous or uneconomic contractual rates or terms designed to prevent nonaffiliated shippers from obtaining the contractual committed service.[18]

8. Third, the Commission has long recognized that there is an inherent incentive for a regulated entity to unduly discriminate in favor of an affiliate.[19] In other contexts, the

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to the integrated company"); *see also Williams Pipe Line Co.*, Opinion No. 154, 21 FERC ¶ 61,260, at 61,587 n.115 (1982) ("If the X Oil Company charges itself a lot of money for shipping its own oil over its own line, that is just bookkeeping. But suppose that X also charges Y, an unaffiliated shipper, that same high rate for the use of its line. For Y, that high rate is very real. So we now have something that some will undoubtedly view as undue discrimination of a perniciously anticompetitive type.").

[18] This issue was raised in a request for rehearing of the Commission's order in *Magellan*, 161 FERC ¶ 61,219, asking whether a pipeline can structure the terms and conditions of an open season such that, due to integrated-company economics, its marketing affiliate is the only shipper that can enter into a contract for capacity. The Commission denied this request for clarification as outside the scope of that proceeding. *Magellan* Rehearing Order, 181 FERC ¶ 61,207 at P 28. A shipper also filed comments in that proceeding raising concerns that oil pipelines are structuring open seasons in ways that are economical only for their affiliated shippers, which "threatens . . . access to interstate liquids transportation capacity by other unaffiliated shippers" and leaves them at a disadvantage in the marketplace. Shell Comments at 6-8.

[19] *Ne. Utils. Serv. Co.*, 66 FERC ¶ 61,332, at 62,090 (1994) ("In arm's-length transactions, assuming relatively equal bargaining strength between the parties, the buyer will be able to protect itself against excessive charges or unreasonable contract provisions. . . . In the case of affiliate transactions, however, the buyer has less incentive

Commission has found that affiliate transactions require additional scrutiny.[20] The Commission has adopted policies in these other contexts to mitigate concerns that affiliates may coordinate in ways that involve self-dealing and anti-competitive behavior to the detriment of other customers.[21] We believe such considerations are appropriate

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to bargain for the lowest possible rates and most reasonable contract provisions, because ultimately all provisions will benefit the common parent."); *Iowa S. Utils. Co.*, 58 FERC ¶ 61,317, at 62,014 n.10 ("Self-dealing may arise in transactions between affiliates because such affiliates may have incentives to offer terms to one another which are more favorable than those available to other market participants."), *reh'g denied*, 59 FERC ¶ 61,193 (1992); *see also Ass'n Gas Distribs. v. FERC*, 824 F.2d 981, 1009 (D.C. Cir. 1987) (discounts in favor of a pipeline's gas trading affiliate "may carry more than the usual risk of undue discrimination").

[20] E.g., *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995) ("[T]he Commission gives 'special scrutiny' to fuel supply contracts between a utility and its subsidiary or an affiliated company."); *Allocation of Capacity on New Merch. Transmission Projects & New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038, at P 34 (2013) (developer allocating capacity for new merchant transmission project has a "high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly preferential or discriminatory"); *Bidding by Affiliates in Open Season Bids for Pipeline Capacity*, Order No. 894, 76 FR 72301 (Nov. 23, 2011), 137 FERC ¶ 61,126 (2011) (rule to prevent affiliated entities from coordinating their open season bids to obtain a disproportionate share of natural gas pipeline capacity at the expense of single bidders); *Ne. Utils. Serv. Co.*, 66 FERC at 62,089 ("The Commission long has recognized, and the courts have agreed, that transactions between affiliated companies require close scrutiny."); *Iowa S. Utils. Co.*, 58 FERC at 62,014 ("[I]n looking at dealings between affiliates, the Commission is presented with a different set of concerns . . . because affiliates share common corporate goals—profits for stockholders that own both entities—and therefore have an incentive to engage in preferential transactions.").

[21] *See*, e.g., *Bos. Edison Co. Re: Edgar Elec. Co.*, 55 FERC ¶ 61,382, at 62, 167-68 n.56 (1991) (*Edgar*) ("The Commission's concern with the potential for affiliate abuse is that a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings."); Order No. 894, 137 FERC ¶ 61,126 at P 11 (multiple affiliates bidding in natural gas pipeline open seasons harms other entities and their customers and has a "chilling effect on competition"); *Chinook*

here because a similar potential exists for an oil pipeline to afford its affiliate an undue preference.[22]

9. In light of the above, we are concerned that our current practices may not be sufficient to ensure Affiliate-Only Committed Service is just, reasonable, and not unduly discriminatory under the ICA.[23] Notwithstanding the concerns discussed above, under

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Power Transmission, LLC, 126 FERC ¶ 61,134, at P 49 (2009) (heightened scrutiny applies where a merchant transmission developer's affiliates are anchor customers due to "concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate and subsidize the merchant project inappropriately"); *Magellan*, 161 FERC ¶ 61,219 at P 14 (transactions between an oil pipeline and its marketing affiliate would violate the ICA's prohibition on rebates).

[22] *See Revisions to Oil Pipeline Regs. Pursuant to the Energy Pol'y Act of 1992*, Order No. 561, 58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs. ¶ 30,985, at 30,960 (1993) (cross-referenced at 65 FERC ¶ 61,109) (recognizing "a concern . . . with allowing a pipeline that may possess market power to control prices in a market to establish an initial rate through negotiations" and requiring at least one nonaffiliated shipper to agree to a rate to "provide some measure of protection against a pipeline exercising market power to dictate the rate it will charge"), *order on reh'g,* Order No. 561-A, 59 FR 40243 (Aug. 8, 1994), FERC Stats. & Regs. ¶ 31,000, at 31,106 (1994) (cross-referenced at 68 FERC ¶ 61,138) ("The purpose of requiring the one shipper who must agree to the initial rate to be unaffiliated with the pipeline is to ensure that the agreement is based upon arms-length negotiations."), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC,* 83 F.3d 1424 (D.C. Cir. 1996); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151 at P 30 (oil pipelines must show that a nonaffiliated entity agrees to a negotiated rate due to the "concern that potential market power could be exercised against shippers who did not agree to the negotiated rate"); *Magellan*, 161 FERC ¶ 61,219 at P 21 (finding an oil pipeline's proposed affiliate transactions would "violate the ICA's anti-discrimination provisions by offering pipeline transportation pursuant to customized terms, conditions, and rates unavailable to shippers who utilize [the] pipeline directly through nominating volumes under the pipeline's published tariff").

[23] We observe that Congress brought oil pipelines under the ICA to address concerns regarding affiliate collusion and competitive imbalances caused by integrated ownership of transportation facilities. *See United States v. Champlin Refin. Co.*, 341 U.S. 290, 297-298 (1951) ("There is little doubt, from the legislative history, that the Act was passed to eliminate the competitive advantage which existing or future integrated

present policy, the Commission has generally approved Affiliate-Only Committed Service rates and terms without distinguishing between affiliates and nonaffiliates or evaluating whether the pipeline afforded its affiliate an undue preference in the open season.[24]

III. Proposed Policy

10. Upon consideration of the issues discussed above, we propose to revise our policy for evaluating whether an open season resulting in Affiliate-Only Committed Service is just, reasonable, and not unduly discriminatory under the ICA.[25] Specifically, as discussed below, we propose: (1) a safe-harbor mechanism pipelines may use to demonstrate that Affiliate-Only Committed Service rates are just, reasonable, and not

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companies might possess from exclusive ownership of a pipe line."); *The Pipeline Cases (United States v. Ohio Oil Co.)*, 234 U.S. 548, 559 (1914) ("Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself."); Opinion No. 154, 21 FERC at 61,582 (Standard Oil "kept its crude pipeline rates high, thus enabling the railroads to hold on to business that they would have lost had Standard [Oil] passed the lower costs of pipeline transit on to unaffiliated shippers" in exchange for preferential rates from the railroads).

[24] *See*, e.g., *Medallion*, 170 FERC ¶ 61,192; *Medallion Del. Express, LLC*, 163 FERC ¶ 61,170 at P 8; *Stakeholder*, 160 FERC ¶ 61,010 at P 4; *Medallion Pipeline Co.*, 157 FERC ¶ 61,075 at P 11; *EnLink Crude*, 157 FERC ¶ 61,120 at P 4.

[25] 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1); *see also Tex. & Pac. Ry. Co. v. ICC*, 162 U.S. 197, 233 (1896) (explaining that the ICA's purpose is to "make charges for transportation just and reasonable" and "forbid undue and unreasonable preferences or discriminations"); *ICC v. Balt. & Ohio R.R. Co.*, 145 U.S. 263, 276 (1892) (stating that the "principal objects" of the ICA include "secur[ing] just and reasonable charges for the transportation" and "prohibit[ing] unjust discriminations in the rendition of like services under similar circumstances and conditions").

unduly discriminatory; and (2) standards for evaluating whether Affiliate-Only Committed Service non-rate terms offered in the open season were structured to unduly discriminate against nonaffiliates.

11. We emphasize that under the proposed guidance, affiliates may continue to participate in oil pipeline open seasons and become committed shippers on their affiliated pipelines. Where an affiliate of the pipeline and one or more nonaffiliated shippers agree to the same contractual committed service offered in an open season, there is less concern that a pipeline may have unduly discriminated in favor of its affiliate.[26] Further, the proposed guidance is not a blanket prohibition on oil pipelines implementing Affiliate-Only Committed Service. The fact that no nonaffiliated shipper agrees to a contractual committed service does not, in and of itself, provide a basis for finding that the pipeline unduly discriminated in favor of an affiliate.[27] There are legitimate reasons that nonaffiliated shippers may choose not to make a term commitment to a particular service offered under a contract by a pipeline.[28] Instead, the Proposed Policy Statement is

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[26] For instance, in the absence of a protest, the Commission's regulations allow pipelines to justify initial rates for new service by filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question. 18 CFR 342.2(b).

[27] *See Magellan*, 161 FERC ¶ 61,219 at P 19 (explaining that the ICA does not impose "a blanket restriction on integrated company financing," but "[t]he issue of integrated company finances is instead a ratemaking and accounting matter concerning the justness and reasonableness of a carrier's rates and rate structures").

[28] We also recognize that in many circumstances, a pipeline has an incentive to obtain commitments from nonaffiliated shippers. Securing term commitments from nonaffiliated shippers can mitigate a pipeline's financial risk and provide the pipeline with a stable, assured revenue stream supporting the pipeline. E.g., *TransCan. Keystone*

intended to provide guidance regarding the policy the Commission intends to apply when evaluating Affiliate-Only Committed Service to ensure it is just, reasonable, and not unduly discriminatory or preferential under the ICA.

A. Affiliate-Only Committed Service Rates

12. The Commission's evaluation of whether the open season favored a pipeline's affiliate requires considering the contractual committed rate that was offered in the open season. During the open season process, a shipper must decide whether to commit to pay the contractual committed rate, including any rate increases permitted by the contract, over the entire term of the agreement (which may span several years).[29] If no nonaffiliate agrees to such a rate, the rate does not result from an arm's-length negotiation and there can be no presumption that the rate is just and reasonable.[30]

Pipeline, LP, 125 FERC ¶ 61,025, at P 21 (2008) (committed rates "support pipelines' efforts to attract shippers that will make long-term volume commitments to support the construction of new facilities."); *Enbridge Pipelines (S. Lights) LLC*, 141 FERC ¶ 61,244, at P 4 (2012) ("[I]t was necessary to obtain financial support through long-term volume commitments without which the project could not move forward."); *Express*, 76 FERC at 62,254 ("[L]onger term commitments provide greater assurances . . . and hence more long-term revenue stability").

[29] *See*, e.g., *Medallion*, 170 FERC ¶ 61,192 at PP 7-8 (pipeline's TSA with its affiliate had a 10-year term); *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277 at P 3 (pipeline's TSA with its affiliate had a 20-year term).

[30] Whereas an excessively high rate could preclude a nonaffiliate shipper from making a commitment, an affiliated shipper may be indifferent to any rate paid to its affiliated pipeline because the expenditures and earnings of the affiliates are combined at the parent-company level under integrated-company economics. *See supra* P 7 (citing *Magellan*, 161 FERC ¶ 61,219 at P 14; Opinion No. 154, 21 FERC at 61,587 n.115).

13. To provide greater certainty about how the Commission will evaluate proposed Affiliate-Only Committed Service rates in the absence of this presumption, we propose a safe-harbor mechanism for a pipeline proposing an Affiliate-Only Committed Service to show that the rate offered in the open season is just and reasonable and not designed to exclude nonaffiliates. Under this safe harbor, where a pipeline shows that it offered a rate at or below the cost-of-service over the full term of the agreement, the Commission would presume the rate offered in the open season was just, reasonable, and not unduly discriminatory. Because the shipper in the open season must consider the rate that applies over the full contract term, the safe harbor similarly considers the rate over the full contract term. We believe that it is appropriate for the proposed safe-harbor mechanism to rely on cost-of-service support for the Affiliate-Only Committed Service rate because it provides a method to demonstrate the open season was not structured to favor the pipeline's affiliate and that, on the contrary, the Affiliate-Only Committed Service rate is just and reasonable. In fact, the Commission has long recognized that cost-of-service ratemaking provides one mechanism for protecting against an exercise of market power.[31]

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[31] *See ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 961 (D.C. Cir. 2007) ("[T]he purpose of a cost-of-service rate . . . is to simulate what a pipeline's economic behavior would be in a competitive market."); *SFPP, L.P.*, 121 FERC ¶ 61,240, at P 14 (2007) (stating that "cost-of-service rate making seeks to replicate a competitive rate"). For this reason, § 342.2(a) of Commission's regulations requires oil pipelines to provide cost-of-service support for initial rates where the pipeline does not provide that at least one nonaffiliated shipper who intends to use the service has agreed to the rate. 18 CFR 342.2. When adopting the initial rate regulation, the Commission rejected the suggestion that an initial rate be entitled to a presumption of lawfulness. Instead, the Commission required initial rates to be supported by either agreement of a nonaffiliated

14. We propose two ways for satisfying the safe harbor. First, a pipeline could: (1) provide cost-of-service support for the initial rate;[32] (2) provide in the contract that adjustments to the rate over the term of the contract by the pipeline would be pursuant to the Commission's cost-of-service and indexing regulations;[33] (3) provide in the contract that the committed shipper has the right to directly challenge the committed rate on a cost-of-service basis during the term;[34] and (4) provide that whenever the rate is established or changed during the contract term on a cost-of-service basis, the cost of service will be set at a 100% load factor (or some other reasonable limit) as described below.

15. Alternatively, a pipeline could: (1) provide cost-of-service estimates to support the contract rate for the entire contract term;[35] (2) provide in the contract that the

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shipper or a cost-of-service showing to protect against the pipeline exercising market power and potentially charging excessive rates to nonaffiliated shippers or unduly preferential rates to affiliated shippers contrary to the requirements of the ICA. *See* Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,960.

[32] The cost-of-service showing could be similar to the information required under § 346.2 with the exception that the rate would need to be based upon 100% load factor or some other reasonable throughput projection as discussed below. *See* 18 CFR 346.2(b).

[33] *Id.* 342.3, 342.4(a).

[34] *Id.* 343.2(c).

[35] The cost-of-service estimates could be similar to the information required under § 346.2 but estimating the costs over the full term of the contract. *See id.* 346.2. For example, in *Express*, 76 FERC ¶ 61,245, a pipeline provided cost-of-service estimates for each year its proposed contract rates would be in effect under the 15-year term of the agreement. Although the contract rates in *Express* were agreed to by a nonaffiliated

committed shipper may have a one-time right to challenge such cost-of-service showing made in the pipeline's initial filing for the service; and (3) apply a 100% load factor (or some other reasonable limit) as discussed below.

16. Regarding our proposal to require that the cost of service be based upon a 100% load factor or some other reasonable limit to satisfy the safe harbor, we are concerned that a cost of service that uses an unreasonably low load factor will not provide sufficient protections to nonaffiliated shippers. For instance, using actual throughput for any rate adjustments during the term of the agreement may place all of the risk for reductions in the pipeline's throughput on the committed shipper, which could deter participation by nonaffiliates.[36] Additionally, a cost of service based on a new pipeline's initially low throughput as it ramps up service may lead to a rate that is significantly above a cost of service over the full term of the contract.[37]

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shipper, commenters may address whether a similar showing could be used to support Affiliate-Only Committed Service rates.

[36] In particular, revising a contract rate using a cost of service that contains a reduced load factor could result in the rate increasing significantly during the contract term. Transportation rates are derived by dividing the pipeline's total costs by the pipeline's throughput; thus, using a reduced load factor (i.e., reducing the throughput in the denominator) would result in a higher rate. Stipulating in the contract that any rate adjustments during the contract's term will use a 100% load factor or some other reasonable limit would safeguard shippers against this risk.

[37] *See White Cliffs Pipeline, L.L.C.*, 126 FERC ¶ 61,070, at P 32 (2009) (requiring cost of service for a new pipeline to be calculated based on design capacity rather than initial projected throughput and noting the use of design capacity results in a considerably lower rate); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211, at PP 44-46 (2005) (rejecting proposal to calculate cost of service using a projected throughput based only on

17. We recognize that using a 100% load factor may not be appropriate in all circumstances.[38] However, we propose that when a pipeline establishes or adjusts a contract rate on a cost-of-service basis, the cost of service should use either a 100% load factor or an alternative load factor that reasonably approximates the pipeline's expected throughput over the life of the contract.

18. As we consider this proposal, we recognize that § 342.2(a) of the Commission's existing regulations requires a pipeline to provide a cost of service when filing an initial rate.[39] However, the initial-rate filing requirement in § 342.2(a) does not incorporate the full set of rate-related issues the Commission must consider prior to concluding that the open season rate offering was consistent with the ICA and accepting tariff records implementing an Affiliate-Only Committed Service. As discussed above, the evaluation of the open season requires consideration of the contractual committed rate over the full term of the contract, not merely the initial rate at the time the committed service begins. The contractual committed rate may include escalation clauses[40] or, alternatively, the cost

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initial volume commitments (excluding volume commitment ramp-ups and any uncommitted volumes), instead of design capacity).

[38] For example, a pipeline transporting crude oil from a production field with declining output may experience commensurate declines in throughput that justify using a load factor below 100%. Alternatively, pipelines transporting products with seasonal demand may operate at or near full capacity during certain periods and below capacity in other periods, which could make using a 100% load factor inappropriate.

[39] 18 CFR 342.2(a); *see also Targa NGL Pipeline Co.*, 166 FERC ¶ 61,179 (2019), *reh'g denied*, 181 FERC ¶ 61,210 (2022).

[40] For example, a pipeline could offer a ten-year contract in an open season with a rate based on cost of service for the first year of service, but drastic rate increases to

of service when the pipeline initiates service may not meaningfully correspond to the cost of service over the life of the agreement.[41] Therefore, filing requirements under § 342.2(a) for supporting initial rates with cost-of-service data are not sufficient to ensure that a pipeline's open season leading to an Affiliate-Only Committed Service is just, reasonable, and not unduly discriminatory.

19. We seek comment on the above proposed guidance for a safe harbor when a pipeline shows that it offered a rate at or below cost of service over the life of the contract. We recognize there may be other ways to provide cost-of-service support for an Affiliate-Only Committed Service rate over the full term of the contract than the approaches proposed above and seek comment on any other methods for making such cost-of-service showing.

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unreasonable levels for the remaining nine years in order to deter nonaffiliates from obtaining the contractual committed service. The pipeline could comply with § 342.2(a) by filing cost-of-service workpapers under 18 CFR part 346 that demonstrate the initial rate shown in its tariff upon commencing the committed service is at or below a cost-of-service ceiling level. Here, the pipeline's compliance with § 342.2 is insufficient to demonstrate that the pipeline's open season did not provide an undue preference to its affiliate.

[41] For example, a pipeline's throughput levels often ramp-up in the period after the pipeline begins service. As a result, throughput levels in the first 12 months of service may be significantly below the throughput levels over the subsequent years. For example, if a pipeline signs a 10-year contract for committed service and the pipeline's throughput levels in the first year are only 25% of the throughput levels in years two through 10 of the committed service contract, the cost of service based upon those low throughput levels does not establish that the pipeline's rate over a 10-year period is just, reasonable, and not unduly discriminatory. However, the initial rate regulation only considers a projection of the first 12 months of service. *See* 18 CFR 346.2(a)(3) ("For a carrier which is establishing rates for new service, the test period will be based on a 12-month projection of costs and revenues.").

20. Although we propose a cost-of-service safe harbor, we seek comment on any other methods for demonstrating that an Affiliate-Only Committed Service rate is not the product of undue discrimination designed to exclude nonaffiliate shippers. Comments proposing alternative methods for supporting Affiliate-Only Committed Service rates should: (1) provide a detailed description of the proposed method for justifying an Affiliate-Only Committed Service rate; (2) describe the information a pipeline would need to provide in order to support the proposed rate under the proposed method; (3) explain how such a showing would support a finding that the rate is just and reasonable and does not reflect undue discrimination towards potential nonaffiliated shippers; and (4) address whether such method is consistent with the Commission's regulations or, if not, changes that would be necessary to permit such method.

B. Affiliate-Only Committed Service Non-Rate Terms

21. Where an open season results in Affiliate-Only Committed Service, we also propose guidance and seek comment regarding the policies the Commission should apply to evaluate whether non-rate terms offered in the open season operated to exclude nonaffiliates from obtaining the capacity.

22. As discussed above, the Commission honors contract rates and terms that were agreed to in a transparent open season that involved arm's-length negotiations among sophisticated business entities, finding the rates and terms established by such contracts just and reasonable and not unduly discriminatory or preferential.[42] However, when only

[42] E.g., *Tesoro High Plains Pipeline Co.*, 148 FERC ¶ 61,129 at P 23 ("The Commission honors the contract terms entered into by sophisticated parties that engage in

an affiliated shipper agrees to a particular contractual service, fairness cannot be inferred, and the Commission must evaluate whether the pipeline gave an undue preference to its affiliate.[43] As with contract rates, a pipeline may design non-rate terms such as minimum volume commitments,[44] minimum term-length requirements,[45] deficiency provisions,[46] or duty-to-support clauses[47] to make the contractual committed service onerous or

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an arms-length negotiation."); Opinion No. 546, 154 FERC ¶ 61,070 at PP 40-42 (holding that a proper review of a pipeline's committed rates includes investigating whether the open season involved arm's-length negotiations); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151 at P 25 ("Absent a compelling reason, it would be improper to second guess the business and economic decisions made between sophisticated businesses when entering negotiated rate contracts.").

[43] *New York v. United States*, 331 U.S. at 296 ("The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations.").

[44] *See Enterprise Crude*, 166 FERC ¶ 61,224 at P 8 (finding that a contract offered in an open season that included a large minimum volume requirement that was not justified by operational requirements and only allowed pipeline to accept one committed shipper "had the effect of giving undue or unreasonable preference or advantage to large shippers").

[45] Like minimum volume requirements, a long minimum term commitment that departs from industry standards without any explanation may be an indication that the pipeline intended to unduly discriminate in favor of its affiliate. For example, an affiliated shipper may incur no additional risk when agreeing to a 20-year contract with its affiliated pipeline, but a 20-year term could impose significant risk on a nonaffiliated shipper that would be required to pay the contract rate for its committed volumes (or incur significant shortfall penalties) throughout the term.

[46] As discussed above, an affiliate may not be meaningfully bound to deficiency or shortfall penalties because deficiency payments and penalties may be transfer payments within an integrated economic entity.

[47] *See Nexen*, 121 FERC ¶ 61,235 at PP 51-52 (finding invalid a duty-of-support provision that "can be interpreted in a broad manner so as to limit a shipper's rights before the Commission").

uneconomic for nonaffiliate market participants. However, whereas the Commission may rely upon cost-of-service ratemaking as a substitute for arm's-length negotiations,[48] no similar single proxy exists for non-rate terms. Thus, the Commission may consider multiple factors in determining whether non-rate terms were structured to unduly discriminate against nonaffiliates, including whether the terms depart from industry standards, impose excessive burdens or risk on nonaffiliates, or do not appear reasonably tailored to further legitimate business objectives.

23. Furthermore, we propose to apply a rebuttable presumption that Affiliate-Only Committed Service is unduly discriminatory and not just and reasonable where the affiliate, any time before or shortly after the committed service begins,[49] remarkets the contracted capacity to one or more nonaffiliated third parties.[50] Given that a nonaffiliated third party subsequently purchased the remarketed capacity, a nonaffiliated third party's decision not to make a commitment for capacity in the open season indicates that the terms offered in the open season were less favorable. This raises concerns as to whether the terms offered in the open season were consistent with the terms demanded by the market in an arm's-length transaction.[51] Moreover, the pipeline's apparent failure to

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[48] *See supra* P 13.

[49] This would include the open season and the time around the open season.

[50] Remarketing may include partial assignments, buy-sells, capacity sales, or other similar arrangements involving transportation service on the affiliated pipeline.

[51] *See Edgar*, 55 FERC at 62,169 (evidence of nonaffiliated buyers in the relevant market purchasing a similar service can be relevant to assessing whether a regulated entity's transaction with its affiliate was unduly discriminatory); *Seahawk*, 175 FERC

offer terms in the open season consistent with market demand raises further concerns that the pipeline structured the open season offerings to ensure that the affiliate would emerge from the open season process as the only contractual committed shipper so that the affiliate could subsequently remarket the capacity without complying with the full requirements of the ICA that bind the pipeline itself.[52] In this situation, we are concerned that the open season and resulting Affiliate-Only Committed Service may be unjust, unreasonable, and unduly discriminatory or preferential.

24. Accordingly, where a pipeline's affiliate, any time before or shortly after the committed service begins, remarkets that capacity to a nonaffiliate in an agreement involving transportation service,[53] we propose to apply a rebuttable presumption that the

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¶ 61,186 at P 15 (rejecting proposal to find an Affiliate-Only Committed Service rate reasonable based on the affiliate's sub-assigning the contract to a nonaffiliate under different terms).

[52] *See Magellan*, 161 FERC ¶ 61,219 at P 6 (describing how a pipeline's marketing affiliate could enter a contract in an open season for the pipeline's capacity and then remarket the capacity to third parties at different private rates and terms that would profit the integrated company (comprised of the affiliated pipeline and marketing arm)); *see also* Airlines for Am. and Nat'l Propane Gas Ass'n, Petition for Rulemaking, Docket No. RM18-10-000, at 11 (filed Feb. 1, 2018) (expressing concerns that "pipelines and their marketing affiliates appear to be engaging in the practice of selling transportation service, on a non-transparent basis, to some but potentially not all would-be purchasers below or above the rate listed in the pipeline's FERC-jurisdictional tariff and thereby selling transportation services at a loss or gain, on a discriminatory and preferential basis, in order to benefit the bottom line of the integrated company"); *id.* at 24 (expressing concerns that pipelines are "using their affiliate marketers to offer discounted service on their pipeline systems at non-transparent rates and terms unregulated by the Commission and not necessarily available to all shippers on the subject pipeline").

[53] For example, if a pipeline indicated in a petition for declaratory order or tariff filing that the affiliate committed shipper intends to or has already entered an agreement with a nonaffiliate prior to the end of the open season, then such facts would lead to a

open season and the ensuing Affiliate-Only Committed Service terms were unduly discriminatory and not just and reasonable. However, we recognize that this presumption will likely be rebuttable in some circumstances. Relevant considerations could potentially include, but are not limited to: (1) the affiliate's business purpose at the time of the open season; (2) whether the affiliate is acting as a marketer or simply selling the capacity in connection with the sale of all or part of its business; (3) whether the sale was a limited, one-time sale; and/or (4) how much time elapsed between the date of the open season and the affiliate's decision to sell the capacity.

25. We seek comment on this proposed presumption as well as the considerations that could rebut the presumption.[54] Moreover, commenters may address situations in which a nonaffiliated party may prefer to access capacity via a transaction with the pipeline's affiliate as opposed to entering a contract for committed-shipper service in the open season from the pipeline or requesting uncommitted service offered in the pipeline's tariff. In addition, we seek comments explaining whether any Commission policies or pipeline practices and tariffs present disadvantages or impediments that create incentives for entities to transact with a pipeline's affiliate rather than seek committed or

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rebuttable presumption that the open season and resulting Affiliate-Only Committed Service were unduly discriminatory and not just and reasonable.

[54] For instance, commenters could consider whether the presumption could be rebutted where the affiliate: (i) remarkets the capacity upon exiting the business several years after the open season concludes; (ii) intermittently sells relatively small amounts of excess capacity; or (iii) moves a third-party shipper's product as part of a larger transaction involving processing that product at the affiliate's processing facility.

uncommitted service directly from the pipeline. For any issues identified, we seek comment on potential actions that the Commission could take to alleviate such disadvantages or impediments while remaining consistent with our obligations under the ICA.

IV. **Conclusion**

26. We seek input on the above proposals or any other approaches for oil pipelines to demonstrate that Affiliate-Only Committed Service is just and reasonable and not the result of undue discrimination to exclude potential nonaffiliated committed shippers. We also invite comments on any other issues or factors related to affiliate preferences or affiliated shippers' activities on the secondary market that the Commission should consider for inclusion in the policy statement.

V. **Comment Procedures**

27. The Commission invites comments on this Proposed Policy Statement by February 13, 2023, and Reply Comments by March 30, 2023. Comments must refer to Docket No. PL23-1-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

28. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at http://www.ferc.gov. The Commission accepts most standard word processing formats. Documents created electronically using word

processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

29. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

VI. Information Collection Statement

30. The collection of information discussed in this Proposed Policy Statement is being submitted to the Office of Management and Budget (OMB) for review under 44 USC 3507(d) of the Paperwork Reduction Act of 1995 (PRA) and OMB's implementing regulations.[55] The following estimate of reporting burden is related only to this Proposed Policy Statement.

Estimated Annual Burden[56] due to Docket No. PL23-1 (Figures may be rounded)					
Number of Potential Respondents (1)	**Annual Number of Responses Per Respondent**	**Total Number of Responses (1)*(2)= (3)**	**Average Burden Hours &**	**Total Annual Burden Hours & Total Annual Cost ($) (3)*(4)=**	**Cost per Respondent ($) (5)÷(1)= (6)**

[55] 5 CFR pt. 1320.

[56] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. *See* 5 CFR 1320 for additional information on the definition of information collection burden.

	(2)		Cost ($)[57] Per Response (4)	(5)	
20	1	20	10 hrs.; $910	200 hrs.; $18,200	$910

Title: FERC-550A, PL23-1-000, Oil Pipeline Affiliate Committed Service.

Action: Proposed information collection.

OMB Control No.: 1902-NEW.

Respondents: Oil pipelines.

Frequency of Information Collection: On occasion.

Necessity of Voluntary Information Collection: The information collected pursuant to this Proposed Policy Statement would help the Commission in evaluating whether contractual committed transportation service complies with the Interstate Commerce Act where the only shipper to obtain the contractual committed service is the pipeline's affiliate.

Internal Review: The opportunity to file the information conforms to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the opportunity to file the information.

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[57] Commission staff believes the industry's average hourly cost for this information collection is approximated by the Commission's average hourly cost (for wages and benefits) for 2022, or $91.00/hour.

31. Interested persons may provide comments on this information-collection by one of the following methods:

Electronic Filing (preferred): Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.

USPS: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426.

Hard copy other than USPS: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

32. Interested persons may obtain information on the reporting requirements by contacting Ellen Brown, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

33. Please send comments concerning the collection of information and the associated burden estimates to OMB through www.reginfo.gov/public/do/PRAMain, Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB Control Number 1902-NEW in the subject line.

34. *Instructions:* OMB submissions must be formatted and filed in accordance with submission guidelines at: www.reginfo.gov/public/do/PRAMain; using the search function under the “Currently Under Review field,” select Federal Energy Regulatory Commission, click “submit,” and select “comment” to the right of the subject collection.

VII. <u>Document Availability</u>

35. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the

contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov).

36. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

37. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By direction of the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Oil Pipeline Affiliate Committed Service Docket No. PL23-1-000

(Issued December 16, 2022)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order.[1] I would normally not oppose a proposed policy statement. There is often nothing wrong with seeking a record to consider reforms. I am also generally skeptical of affiliate transactions and think that the Commission should apply a heightened review as compared to non-affiliate transactions.

2. However, this proposal is, for the most part, not new. This is not a genuine request for comment. The policies proposed today (particularly the safe harbor) are nearly identical to those proposed two years ago in the policy statement on *Oil Pipeline Affiliate Contracts*,[2] which was withdrawn two days after the expiration of the initial comment deadline.[3] Were one unfamiliar with the Commission's oil docket one would not know this if all one had to rely upon was today's order. While that proceeding is mentioned in a footnote nearly a third of the way through the order,[4] there is "nothing [in the order] so much as an acknowledgement of the views expressed."[5] The majority

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[1] *Oil Pipeline Affiliate Committed Service*, 181 FERC ¶ 61,206 (2022 Policy Statement).

[2] *Compare Oil Pipeline Affiliate Contracts*, 173 FERC ¶ 61,063 (2020) (2020 Policy Statement) *with* 2022 Policy Statement, 181 FERC ¶ 61,206 at PP 14-15. Other proposals also appear similar to the 2020 Policy Statement. For example, the 2022 Policy Statement proposes to consider whether the non-rate terms "depart from industry standards" and "impose excessive burdens or risk on nonaffiliates," *id.* P 22, which are similar to the 2020 Policy Statement's request for comment on "proposed guidance for a carrier seeking to implement rates and terms pursuant to an Affiliate Contract to demonstrate that it did not unduly discriminate in favor of an affiliate by offering excessively burdensome or uneconomic contract terms," 173 FERC ¶ 61,063 at P 35.

[3] *Oil Pipeline Affiliate Contracts*, 173 FERC ¶ 61,250 (2020) (Order Withdrawing 2020 Policy Statement).

[4] 2022 Policy Statement, 181 FERC ¶ 61,206 at P 5 n.14.

[5] Order Withdrawing 2020 Policy Statement, 173 FERC ¶ 61,250 (Glick, Comm'r,

chooses to omit (and presumably ignore) comments that exposed profound weaknesses that counseled a more deliberate approach in that (and now this) proposed policy.

3. For example, commenters in the original proceeding alleged that there was (there still is) no record evidence supporting the Commission's premise that its policies—or the complaint mechanisms afforded by the statute—are inadequate to the task of preventing or remediating affiliate abuse in settlement rate negotiations, or for that matter, that such affiliate abuse even exists commonly enough to justify this proceeding at all.[6] One comment stated that of the 140 petitions for declaratory order that had been approved by the Commission from 2010 through 2020, "*only one* . . . arguably included allegations of undue affiliate preference"[7] and even in that case, "the crux of the shipper's challenge did not hinge on affiliate concerns."[8] Another comment questioned the entire proceeding, explaining that the proceeding was based on a fundamental misapprehension as to how the business operates, stating that presumably other midstream companies "invest significant capital in order to attract shippers, not keep shippers away."[9]

4. The majority does not acknowledge the comments from the earlier proceeding that state that there may not be a problem at all nor does it ask about whether there is a problem. Instead, the majority insists that "parties have raised concerns,"[10] citing the

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dissenting at P 1).

[6] *See, e.g.*, Indicated Carriers December 14, 2020 Initial Comments, Docket No. PL21-1-000, at 1 ("[T]he Proposed Policy does not present any evidence demonstrating that the types of undue affiliate preferences that the Proposed Policy purportedly seeks to prevent are more than just a theoretical possibility.") (Indicated Carriers Comments); Targa Resources Corp. December 14, 2020 Initial Comments, Docket No. PL21-1-000, at 8-9 (Targa Comments) ("An underlying predicate of the Proposed Policy Statement seems to be that carriers set rates at artificially high levels that only an affiliate would agree to pay in an effort to keep third-party shippers off of the pipeline. Targa does not believe that there is any evidence that this occurs in the marketplace. The idea that carriers set rates above the level that the market will support in order to keep third-parties from a given pipeline system simply does not make commercial sense.") (footnote omitted).

[7] Indicated Carriers Comments at 10 (emphasis added).

[8] *Id.* 10 n.13.

[9] Enterprise Products Partners L.P. Initial Comments December 14, 2020 Docket No. PL21-1-000 at 4 (Enterprise Products Comments).

[10] 2022 Policy Statement, 181 FERC ¶ 61,206 at P 6.

very complaint proceeding that commenters in the earlier docket explained does not support the majority's position,[11] a complaint proceeding where the Commission found no affiliate abuse.[12] The order also cites comments in *other* proceedings that simply ask hypotheticals[13] and express shippers' "belie[f] this problem . . . exists."[14] In order to justify embarking on a new generic proceeding that proposes burdensome intrusions into the business of regulated entities, there must be *some* evidence that there is an actual problem to solve. And should this or any other policy be finalized, there must be at least substantial evidence. The Commission must eventually do more than "[p]rofess[] that an order ameliorates a real industry problem"[15] or cite parties' "belie[f] that [a] problem . . . exists"[16] in order to meet the statutory requirement of basing its decisions on substantial evidence or the APA's requirement to base orders on reasoned decision-making.

5. Commenters in the original docket identified other fatal weaknesses. The plain terms of the safe harbor, materially the same as that proposed today, contravenes the Commission's regulations by limiting the methodologies by which pipelines can adjust

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[11] *Id.* P 6 n.15 (citing *Blue Racer NGL Pipelines, LLC*, 162 FERC ¶ 61,220 (2018)).

[12] *Id.* (citing *N.D. Pipeline Co.*, 147 FERC ¶ 61,121 (2014)).

[13] *Id.* (citing Magellan Midstream Partners, L.P., Request for Rehearing, Docket No. OR17-2-001, at 5 (filed Dec. 22, 2017) (Magellan Rehearing); Airlines for America and National Propane Gas Association, Petition for Rulemaking, Docket No. RM18-10-000, at 24 (filed Feb. 1, 2018) (referencing the Magellan Rehearing)).

[14] Shell Trading (US) Company, Comments, Docket No. OR17-2-001, at 7 (filed Mar. 14, 2018) (Shell Comments); *see also* 2022 Policy Statement, 181 FERC ¶ 61,206 at P 6 n.15 (citing Shell Comments at 7; Liquid Shippers Group, Comments, Docket No. OR17-2-000, at 4 (filed Dec. 14, 2016) (for purposes of this filing the Liquid Shippers Group includes ConocoPhillips Company, Cenovus Energy Marketing Services Ltd., Devon Gas Services, L.P., Marathon Oil Company, and Statoil Marketing & Trading, Inc.).

[15] *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006); *see also id.* ("FERC has cited *no* complaints and provided *zero* evidence of actual abuse between pipelines and their non-marketing affiliates. FERC staked its rationale in part on a record of abuse, but that record is non-existent.") (emphasis in original).

[16] 2022 Policy Statement, 181 FERC ¶ 61,206 at P 6 n.15 (citing Shell Comments at 7); Shell Comments at 7 (expressing "belie[f] that [a] problem . . . exists").

rates[17] and by requiring the use of a 100% load factor for cost-of-service-based rate adjustments.[18] This is an evident infirmity—agencies cannot amend their regulations without undergoing the notice-and comment procedures required by the Administrative Procedure Act (APA).[19]

6. Although not a threat to the proposal's legal durability, commenters also stated that, if implemented, the safe harbor proposal would result in the Commission "interjecting itself into commercial negotiations,"[20] "imposing contractual terms that would otherwise not find themselves in contracts negotiated at arms' length between third parties."[21] Specifically, they explained that "carriers and contract shippers typically do not agree to a contract rate while also providing a unilateral right to try to change the rate,"[22] and that "[m]ost carriers will be unwilling to invest hundreds of millions of dollars in new infrastructure if their rates—which are the sole means by which the carrier may recoup its investment—may be reduced at any time during the contract term pursuant to a cost-of service challenge."[23]

7. Despite this evidence that was brought before the Commission in the earlier docket, the majority does even mention it, let alone change course, continuing to propose a safe harbor policy that requires carriers to allow shippers to unilaterally challenge a rate.[24] Given the evidence already adduced in an earlier proceeding, one would be

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[17] *See* Tallgrass Pony Express Pipeline, LLC December 14, 2020 Initial Comments, Docket No. PL21-1-000, at 4-5.

[18] *See* Targa Comments at 16 & n.25 (citing 18 C.F.R. § 346.2). Section 346.2 of the Commission's regulations requires that a cost-of-service summary schedule contain "[t]hroughput for the *test period* in both barrels and barrel-miles." 18 C.F.R. § 346.2 (emphasis added).

[19] 5 U.S.C. § 553; *see also Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.").

[20] Targa Comments at 10.

[21] Enterprise Products Comments at 2.

[22] Targa Comments at 15.

[23] Indicated Carriers Comments at 33; *see also id.* at 3 (stating the safe harbor policy "has the very real potential to discourage such carriers from investing in new pipeline infrastructure").

[24] 2022 Policy Statement, 181 FERC ¶ 61,206 at P 14 (providing that one way a

justified in having skepticisms of the majority's claim that this proposed policy "will provide guidance to industry participants that will aid in the efficient deployment of capital."[25]

8. Perhaps worst of all, commenters offered alternative approaches for the Commission's consideration which the majority declined to consider or, in fact, even mention. For example, one party suggested the imposition of a requirement that pipelines demonstrate that affiliate rates are aligned with those of competing pipelines or other modes of transportation.[26] Why not include seemingly reasonable alternatives for comment if you persist in your belief—despite the lack of evidence—that affiliate abuses are widespread in the industry? If the Commission is concerned that a carrier is offering non-market rates to its affiliate, a showing that the rate is consistent with market would seem to address the concern and do so far less invasively and without violating our own regulations.

9. It is a mistake for the majority to repropose a policy shown to have irremediable vulnerabilities under the APA and a near certain chilling effect on investment. The Commission has the benefit of an existing record. Rather than ignoring it, the Commission should have made use of that record to determine whether there is a problem at all and, if there is, use it to determine what additional evidence needs to be gathered, what policy goals it seeks to achieve, and what is the best, least invasive, and most defensible course of action. The Commission should not rush a policy only to have go back and fix known errors.

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pipeline could satisfy the safe harbor by "provid[ing] in the contract that the committed shipper has the right to directly challenge the committed rate on a cost-of-service basis during the term" along with the three other factors); *id.* P 15 (providing an alternative way a pipeline could satisfy the safe harbor by "provid[ing] in the contract that the committed shipper may have a one-time right to challenge such cost-of-service showing made in the pipeline's initial filing for the service" along with two other factors).

[25] *Id.* P 2. A majority has made similar claims before. *See, e.g.*, *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108, P 80 (2022) ("We believe that such clarity ultimately benefits both the regulated community and public by ensuring certainty regarding the Commission's process for reviewing applications for natural gas infrastructure.").

[26] Association of Oil Pipelines December 14, 2020 Initial Comments, Docket No. PL21-1-000, at 33.

For these reasons, I respectfully dissent.

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James P. Danly

Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Oil Pipeline Affiliate Committed Service Docket No. PL23-1-000

(Issued December 16, 2022)

CHRISTIE, Commissioner, *concurring*:

1. I concur in order to put this draft policy statement out for further review and comment.

2. I fully agree that transactions between corporate affiliates are not arms-length transactions. In the regulated energy and utility field, such transactions raise a distinct threat of the exercise of market power. So affiliate transactions certainly require a higher level of scrutiny than those between unaffiliated entities.

3. That is a simple proposition, but this draft statement is not simple, and takes many pages and paragraphs to describe what it is requiring of regulated entities and affiliates, what and which degrees of scrutiny will be applied, when and where, and how the safe-harbor mechanisms will work. The devil is always in the details and whether this lengthy proposed new policy statement has got all the details right remains to be seen, as well as whether a new policy statement is even necessary or preferable to a case-by-case approach. I take seriously the points raised in Commissioner Danly's dissent, particularly on the history of this policy statement and its apparent predecessors.

4. I am willing, however, to put it out for comment and look forward to the comments that may come in from affected parties, including pipeline operators and shippers both affiliated and unaffiliated.

For these reasons, I respectfully concur.

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Mark C. Christie
Commissioner